

**STATE OF NEW MEXICO  
ADMINISTRATIVE HEARINGS OFFICE  
TAX ADMINISTRATION ACT**

**IN THE MATTER OF THE PROTEST OF  
MOHAMED B. ASWAD, M.D., P.C.  
TO REFUND DENIAL  
ISSUED UNDER LETTER  
ID NO. L1204312112**

**No. 17-19**

**DECISION AND ORDER**

A protest hearing occurred in the above-captioned protest on March 14, 2017 before Chris Romero, Esq., Hearing Officer, in Santa Fe, New Mexico. At the hearing, Mohamed B. Aswad, M.D. appeared *pro se* for Mohamed B. Aswad, M.D., P.C. (“Taxpayer”). Staff Attorney Elena Morgan appeared representing the State of New Mexico Taxation and Revenue Department (“Department”). Protest Auditor Milagros Bernardo appeared as a witness for the Department. Department Exhibits A, B and D were admitted into the record. Taxpayer Exhibits #1-1, #1-2, and #3 (except for #3-6) were not admitted as irrelevant. The remainder of Taxpayer Exhibit #1, Taxpayer Exhibit #2, and Taxpayer Ex. #3-6 were admitted into the record at hearing. All exhibits are more thoroughly described in the Administrative Exhibit Coversheet. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. On or about February 6, 2015, Taxpayer asserted a claim for refund for the overpayment of gross receipts taxes paid for the periods ending February through December of 2012. The Department did not take action on the claim within 210 days, but provided Taxpayer with an opportunity to re-file the claim for refund because there was still sufficient time under

the applicable statute of limitations. The claim for refund was in the amount of \$15,728.00.

[Taxpayer Ex. 2-3].

2. On November 4, 2015, Taxpayer re-submitted his claim for refund for the periods ending February through December of 2012. [Taxpayer Ex. 2-1; 2-2].

3. On November 18, 2015, through Letter ID No. L1204312112, the Department denied Taxpayer's claim for refund of \$15,728.00 in CRS taxes for the reporting ending December 31, 2012. [Dept. Ex. D; Testimony of Ms. Bernardo].

4. The Department denied Taxpayer's application for refund because the deductions sought did not align with the information Taxpayer provided in support of the deduction. Many of the prescription drugs for which the deduction was sought failed to come within the definition of "prescribed drugs" as provided in NMSA 1978, Section 7-9-73.2 (2007) requiring that prescription drugs be approved by the U.S. Food and Drug Administration (FDA). [Testimony of Ms. Bernardo; Dept. Ex. D].

5. On February 10, 2016, Taxpayer, by and through Beasley, Mitchell & Co, Certified Public Accountants, protested the Department's denial of claim for refund. As grounds for the protest, Taxpayer indicated that his former certified public accountant had incorrectly reported his gross receipts in 2012 in that the CPA did not claim the applicable deduction for prescription medications. [Testimony of Dr. Aswad].

6. On November 17, 2016, the Taxpayer's protest was received in the Department's Protest Office. It was unclear why a period of approximately nine months elapsed from the date indicated on Taxpayer's protest to the date the protest office received it. The Department and the Taxpayer stipulated that communications between the parties were ongoing and the Department did not assert that the protest was untimely.

7. On November 29, 2016, the Department's protest office acknowledged receipt of a valid protest.

8. On January 9, 2017, the Department filed a Hearing Request with the Administrative Hearings Office, a separate agency, for a protest hearing.

9. On January 10, 2017, the Administrative Hearings Office issued a Notice of Administrative Hearing, setting this matter for a merits protest hearing on February 9, 2017.

10. On February 9, 2017, the Taxpayer submitted a request for continuance which was neither granted nor denied prior to the hearing scheduled to occur at 1 p.m.

11. The Department appeared in person for the hearing. The Taxpayer failed to appear. The Department opposed the request for a continuance. The continuance was granted over the Department's objection.

12. The hearing of February 9, 2017 was held within 90 days of the Department receiving the Taxpayer's protest.

13. On February 10, 2017, the Administrative Hearings Office issued a Continuance Order and Second Notice of Administrative Hearing setting a hearing on the merits to occur on March 14, 2017 in Santa Fe. That order also found that the Administrative Hearings Office had set the hearing to occur within 90-days, and that any delay was attributable to Taxpayer's continuance request.

14. On February 21, 2017, Taxpayer requested permission to appear by telephone for the hearing on the merits. The Department opposed the request.

15. On March 2, 2017, the Administrative Hearings Office entered an Order Denying Request for Telephonic Appearance.

16. Taxpayer is a medical doctor practicing in oncology. [Testimony of Dr. Aswad].  
Taxpayer's medical practice is based in Deming, New Mexico.

17. At all relevant times, Taxpayer was a physician authorized to dispense prescription medications approved by the FDA and obtained through FDA-approved pharmacies. [Testimony of Dr. Aswad].

18. As part of his practice, he purchased medications, administered medications to patients, and billed the appropriate entities or persons for payment. [Testimony of Dr. Aswad].

19. Billings under these circumstances would typically include the costs of the medications in addition to the costs and fees associated with infusing the medications. [Testimony of Dr. Aswad].

20. Taxpayer employed the services of an out-of-state certified public accountant from 2003 to 2014. During that period of time, the certified public accountant handled Taxpayer's gross receipts tax reporting in New Mexico. [Testimony of Dr. Aswad].

21. In 2014, Taxpayer recognized that he was paying \$7,000 to \$8,000 per month in gross receipts taxes. Taxpayer was alarmed at the amount of gross receipts taxes that were being paid. [Testimony of Dr. Aswad].

22. Taxpayer sought the advice of Beasley, Mitchell & Co, Certified Public Accountants (hereinafter "Beasley"), which after a review of Taxpayer's records, determined that the Taxpayer's previous accountant was not claiming all applicable deductions, particularly for prescribed medications. [Testimony of Dr. Aswad].

23. The deduction applicable to prescription medications is NMSA 1978, Sec. 7-9-73.2.

24. As an example, Taxpayer said that if a medication cost \$1,000, and the professional fee associated with administering the medication was \$200, then he could expect payment to reflect the sum of the medication and the professional fee in the amount of \$1,200. Taxpayer's former CPA was reporting and paying gross receipts taxes on the entire amount of \$1,200 rather than reporting and deducting the receipts attributable to the prescription medications. [Testimony of Dr. Aswad].

25. Taxpayer had no prior knowledge, before seeking advice from Beasley, that a deduction from gross receipts was available for prescription medications. [Testimony of Dr. Aswad].

26. Taxpayer's practice regularly purchased oncology medications from three or four pharmaceutical companies. However, one of those pharmaceutical companies, unbeknownst to Taxpayer, was not approved by the FDA. [Testimony of Dr. Aswad].

27. The fact that Taxpayer had been purchasing medications through a non-FDA approved pharmaceutical company came to Taxpayer's attention for the first time in early 2012 when his office was raided by FDA authorities pursuant to a federal search warrant. [Testimony of Dr. Aswad; Dept. Ex. A].

28. Taxpayer was one of several targets of a scam by a company misrepresenting itself as a legitimate FDA-approved pharmaceutical company selling authentic FDA-approved pharmaceuticals. The scam affected more than 250 medical providers in 37 states. [Testimony of Dr. Aswad; Dept. Ex. A].

29. The medications acquired from the non-FDA approved pharmaceutical company were determined to be non-approved. [Testimony of Dr. Aswad]. Moreover, the New Mexico Medical Board determined that the medications were actually counterfeit. In some instances,

chemical analysis of the counterfeit medications indicated that they did not contain any of the active ingredients that they were purported to contain [Dept. Ex. A] despite the fact that they were marketed as being the same or the equivalent to the FDA-approved medications Dr. Aswad required. [Testimony of Dr. Aswad; Dept. Ex. A-010].

30. Taxpayer had unknowingly been acquiring counterfeit medications from the non-FDA approved pharmaceutical company since July of 2010 until the FDA brought the issue to his attention in 2012. [Testimony of Dr. Aswad; Dept. Ex. A-007].

31. The other pharmaceutical companies utilized by Taxpayer were FDA-approved. [Testimony of Dr. Aswad].

32. As a result of his dealings with the non-FDA approved pharmaceutical company, particularly the acquisition and administration of counterfeit medications, Taxpayer incurred professional and criminal sanctions which included, but were not limited to fines, fees, restitution, and restrictions on his license to practice medicine. [Testimony of Dr. Aswad; Dept. Ex. A].

33. Although Taxpayer was subjected to civil and criminal penalties, the New Mexico Medical Board did not find that Taxpayer's actions were intentional or that any of his patients suffered any actual harm. [Testimony of Dr. Aswad; Dept. Ex. A-013].

34. Taxpayer seeks application of the deduction for prescription medications for all receipts for both the authentic FDA-approved medications and the counterfeit non-FDA-approved medications. [Testimony of Dr. Aswad].

35. Taxpayer did not provide for any relevant period of time any documentation to differentiate deductions claimed for legitimate prescriptions from those claimed for the counterfeit non-FDA-approved prescriptions. The data provided in support of Taxpayer's claim

comingles the receipts from the counterfeit non-FDA-approved prescription medications with the legitimate prescription medications. [Testimony of Ms. Bernardo; Testimony of Dr. Aswad]. Taxpayer acknowledged that the information could have been provided but it would be time consuming and costly to do so. [Testimony of Dr. Aswad].

36. Taxpayer prepared and submitted a sample of data to illustrate the amounts of gross receipts taxes he claimed he should have paid after application of the prescription medication deduction versus the gross receipts taxes he actually paid. [Taxpayer Ex. 1]. Dr. Aswad's sample covered February 2012 [Taxpayer Ex. 1-3; 1-4], March 2012 [Taxpayer Ex. 1-5; 1-6], April 2012 [Taxpayer Ex. 1-7; 1-8], May 2012 [Taxpayer Ex. 1-9; 1-10]; and October 2012 [Taxpayer Ex. 1-11; 1-12].

37. For February of 2012, Taxpayer asserted that he overpaid by \$1,573.35. [Testimony of Dr. Aswad; Taxpayer Ex. 1-3; 1-4].

38. For March of 2012, Taxpayer asserted that he overpaid by \$2,167.15. [Testimony of Dr. Aswad; Taxpayer Ex. 1-5; 1-6].

39. For April of 2012, Taxpayer asserted that he overpaid by \$2,431.49. [Testimony of Dr. Aswad; Taxpayer Ex. 1-7; 1-8].

40. For May of 2012, Taxpayer asserted that he overpaid by \$1,879.20. [Testimony of Dr. Aswad; Taxpayer Ex. 1-9; 1-10].

41. For October of 2012, Taxpayer asserted that he overpaid by \$1,486.96. [Testimony of Dr. Aswad; Taxpayer Ex. 1-11; 1-12].

42. Since Taxpayer reported gross receipts utilizing the cash reporting method, receipts during the relevant periods in which records were provided for review indicated that the dates of services extended back into the period of time that Taxpayer was administering

counterfeit non-FDA-approved medications in addition to authentic FDA-approved medications. [Testimony of Ms. Bernardo].

43. Although possible, it would be costly and time consuming to provide documents to differentiate the portions of the claimed deductions that apply to the receipts for authentic FDA-approved medications from the deductions claimed for the counterfeit non-FDA-approved medications. [Testimony of Dr. Aswad].

44. The Department does not interpret the deduction provided for prescription drugs as being applicable to receipts from the sale of counterfeit non-FDA-approved drugs. [Testimony of Ms. Bernardo].

45. Taxpayer did not know that a portion of the prescription medications for which he paid gross receipts taxes were counterfeit at the time he reported gross receipts and remitted payment. [Testimony of Dr. Aswad].

46. As of the date that Taxpayer sought application of the deduction for prescription medications, on February 6, 2015 [Taxpayer Ex. 2-3], the Taxpayer was fully aware of the circumstances regarding the issues stemming from the unwitting acquisition and resale of counterfeit non-FDA-approved prescription medications. [Dept. Ex. A].

47. Taxpayer paid more than \$2,000,000 in fines, fees, and restitution to federal and state authorities in order to resolve the matter and resume his medical practice. [Testimony of Dr. Aswad; Dept. Ex. A-013; Taxpayer Ex. 3-6].

48. Over the entire course of his transactions with the non-FDA-approved pharmaceutical company, Taxpayer paid it \$1,086,667.97 for counterfeit non-FDA-approved medications. [Dept. Ex. A-011; Para. 36]. During the same period of time, Taxpayer was reimbursed the amount of \$1,298,543.00 by Medicare, Medicaid, and Tricare for all medications

he purchased, including both authentic FDA-approved medications and counterfeit non-FDA-approved medications. [Dept. Ex. A-011; Para. 37]. Consequently, Taxpayer's reimbursements exceeded his actual costs by \$211,875.03. [Dept. Ex. A-011; Para. 38].

49. As a requirement of resolving the criminal matter against the Taxpayer, he was court-ordered to pay restitution in the sum of \$1,298,543.00 to the federal government. This amount included amounts received for authentic FDA-approved medications and counterfeit non-FDA-approved medications. Taxpayer made payment on or about August 5, 2015. [Testimony of Dr. Aswad; Taxpayer Ex. 3-6].

## **DISCUSSION**

This protest involves a question of whether Taxpayer is entitled to the application of the deduction for prescription drugs under NMSA 1978, Section 7-9-73.2 (2007). Although application of Section 7-9-73.2 may seem relatively direct on its face, the issue is complicated by the circumstances in which Taxpayer found himself when the FDA notified him that he had been purchasing counterfeit medications from an illegitimate source misrepresenting itself as a legitimate pharmaceutical company.

Although the Department did not issue Taxpayer an assessment in this matter, Taxpayer still has the burden of establishing it was entitled to the claimed refund at issue. Taxpayer's claim for refund is premised on a deduction from gross receipts tax. "Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer." *Wing Pawn Shop v. Taxation and Revenue Department*, 1991-NMCA-024, ¶16, 111 N.M. 735 (internal citation omitted); *See also TPL, Inc. v. N.M. Taxation & Revenue Dep't*, 2003-NMSC-7, ¶9, 133 N.M.

447; *See also Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17 & ¶29, 142 N.M. 779 (Court of Appeals reviewed a refund denial through “lens of presumption of correctness” and applied the principle that deductions underlying the claim for refund are to be construed narrowly). Consequently, Taxpayer still must show that it is entitled to the deduction that is the basis of its claim for refund.

### **Deduction for Prescription Drugs.**

The Taxpayer’s claim for refund is based on the application of NMSA 1978, Section 7-9-73.2 (2007) which provides as follows:

#### **7-9-73.2. Deduction; gross receipts tax and governmental gross receipts tax; prescription drugs; oxygen.**

A. Receipts from the sale of prescription drugs and oxygen and oxygen services provided by a licensed medicare durable medical equipment provider may be deducted from gross receipts and governmental gross receipts.

B. For the purposes of this section, “prescription drugs” means insulin and substances that are:

- (1) dispensed by or under the supervision of a licensed pharmacist or by a physician or other person authorized under state law to do so;
- (2) prescribed for a specified person by a person authorized under state law to prescribe the substance; and
- (3) subject to the restrictions on sale contained in Subparagraph 1 of Subsection (b) of 21 USCA 353.

The testimony in this case established that over the course of many years, Taxpayer reported as gross receipts all reimbursements he received from the purchase and sale of prescription drugs. Dr. Aswad never availed himself of the benefit of the prescription drug deduction. Realizing that he was paying \$7,000 to \$8,000 per month in gross receipts taxes, Dr. Aswad sought the opinion of Beasley, a certified public accounting firm based in New Mexico.

Beasley informed Taxpayer that his out-of-state certified public accountant had not been claiming the deduction available for prescription drugs. Taxpayer apparently acted on the advice of Beasley and submitted an Application for Refund which was executed on February 6, 2015. The sole basis for the refund was that Taxpayer's former CPA did not claim the applicable prescription drug deduction. When the Department failed to act on his refund by October 27, 2015, the Department notified the Taxpayer of his ability to refile his claim, which he did on November 4, 2015.

In the years leading up to Taxpayer's Application for Refund, Taxpayer had been unwittingly involved in a counterfeit medication scheme which resulted in serious civil and criminal sanctions. It was established that from July of 2010 until his office was raided by federal agents in April of 2012, that Taxpayer had unknowingly been administering counterfeit, non-FDA approved medications. The Application for Refund in this protest applies to reporting periods from February of 2012 through December of 2012. The periods in protest overlapped, in part, with those periods of time in which the Taxpayer was unknowingly administering counterfeit drugs. In other words, during the relevant periods of time, an unknown portion of gross receipts taxes were paid on the gross receipts reported from an unknown amount of counterfeit drugs for which Taxpayer now seeks a refund.

Despite the fact that Taxpayer had never previously claimed the deduction for prescription medications, Taxpayer apparently determined that refund applications for earlier periods were precluded by NMSA 1978, Section 7-1-26 which establishes that no refund of any amount may be allowed within three years of the end of the calendar year in which the payment was originally due. *See* NMSA 1978, Section 7-1-26 D (1) (a) (2015). Consequently, Taxpayer limited his protest to the periods ending between February 2012 through December 2012.

Considering the Taxpayer's protest, the Department determined that the Taxpayer could not assert a deduction for prescription drugs which were counterfeit because they were not subject to the restrictions on sale contained in Subparagraph 1 of Subsection (b) of 21 USCA 353, which among other requirements, establishes the condition that prescription drugs be approved by the FDA. *See* 21 U.S.C. Sec. 355. In other words, the Department concluded that the Taxpayer could not claim a deduction from gross receipts deriving from the sale of counterfeit drugs because counterfeit drugs were not "prescription drugs" as that term is defined by Section 7-9-73.2 B (3) (2007).

To the extent Taxpayer's refund application could have applied to legitimate FDA-approved prescription drugs, Taxpayer was unable to distinguish the portions of his refund application that arose from the sale of counterfeit prescription drugs from the receipts received from the sale of legitimate prescription drugs. Taxpayer testified that although extrapolating such information from his records would have been possible, it could not have been accomplished without undue burden and significant expense.

As previously stated, where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer. *See Wing Pawn Shop*. Construing Section 7-9-73.2 in favor of the Department pursuant to *Wing*, the Hearing Officer was persuaded that the prescription drug deduction was not applicable to counterfeit drugs.

To the extent the deduction could have been appropriately asserted to receipts deriving from legitimate prescription drugs, the Taxpayer was unable or unwilling to incur the cost or

expend the effort necessary to extrapolate evidence from his records that could have clearly established a right to the deduction for legitimate prescription drugs.

Under the circumstances, the Taxpayer did not establish a right to the claimed deduction because he was unable to establish that portion of the refund that derived from the receipts of authentic FDA-approved prescription drugs which could have been lawfully deducted under NMSA 1978, Sec. 7-9-73.2.

To the extent Taxpayer relied on the advice of a certified public accountant, whether or not to his detriment, it is the Taxpayer's duty under *Tiffany Constr. Co. v. Bureau of Revenue*, 1976-NMCA-127, ¶5, to ascertain the tax consequences of his actions. A taxpayer cannot "abdicate this responsibility [to learn of tax obligations] merely by appointing an accountant as its agent in tax matters." *El Centro Villa Nursing Center v. Taxation and Revenue Department*, 1989-NMCA-070, ¶14, 108 N.M. 795. Although the task may seem formidable, the Department provides a variety of publications available at no cost intended to provide general guidance on various topics, including gross receipts taxes and deductions. See *FYI-105 Gross Receipts & Compensating Taxes: An Overview* at [www.tax.newmexico.gov/forms-publications.aspx](http://www.tax.newmexico.gov/forms-publications.aspx).

### **Effect of Restitution**

In addition to Taxpayer's reliance on the deduction for prescription drugs at NMSA 1978, Sec. 7-9-73.2, the Taxpayer urged the Hearing Officer to grant his protest because he paid more than \$2,000,000 in criminal and civil penalties, including restitution to reimburse the entities that paid him for the costs of the counterfeit non-FDA-approved prescription drugs. Although the Taxpayer did not expressly reference any deductions in making this argument, the Hearing Officer considered whether the court-ordered restitution intended to reimburse third-parties for

the costs of counterfeit medications might qualify for the deduction provided for refunds and allowances under NMSA 1978, Section 7-9-67.

In relevant part, NMSA 1978, Section 7-9-67 (A) provides that “[r]efunds and allowances made to buyers or amounts written off the books as an uncollectible debt by a person reporting gross receipts tax on an accrual basis may be deducted from gross receipts.” In this protest, the Taxpayer paid restitution as a condition of his federal probation. Payment was made in August of 2015. The question then is whether the term “refund” as used in Section 7-9-67 includes court-ordered restitution.

Questions of statutory construction begin with the plain meaning rule. *See Wood v. State Educ. Ret. Bd.*, 2011-NMCA-20, ¶12. In *Wood*, ¶12 (internal quotations and citations omitted), the Court of Appeals stated “that the guiding principle in statutory construction requires that we look to the wording of the statute and attempt to apply the plain meaning rule, recognizing that when a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.” A statutory construction analysis begins by examining the words chosen by the Legislature and the plain meaning of those words. *State v. Hubble*, 2009-NMSC-014, ¶13, 206 P.3d 579, 584. Extra words should not be read into a statute if the statute is plain on its face, especially if it makes sense as written. *See, Johnson v. N.M. Oil Conservation Comm'n*, 1999-NMSC-21, ¶ 27, 127 N.M. 120, 126, 978 P.2d 327, 333. “Tax statutes, like any other statutes, are to be interpreted in accordance with the legislative intent and in a manner that will not render the statutes’ application absurd, unreasonable, or unjust.” *City of Eunice v. State Taxation & Revenue Dep’t*, 2014-NMCA-085, ¶8 (internal citations and quotations omitted). It is a canon of statutory construction in New Mexico to adhere to the plain wording of a statute except if there is ambiguity, error, an absurdity, or a conflict

among statutory provisions. *See Regents of the Univ. of New Mexico v. New Mexico Fed'n of Teachers*, 1998-NMSC-20, ¶28, 125 N.M. 401. Only if the plain language interpretation would lead to an absurd result not in accord with the legislative intent and purpose is it necessary to look beyond the plain meaning of the statute. *See Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶11, 146 N.M. 473. When applying the plain meaning rule, the statutes should be read in harmony with the provisions of the remaining statute or statutes dealing with the same subject matter. *See State v. Trujillo*, 2009-NMSC-012, ¶22, 146 NM 14. *See also Hayes v. Hagemeier*, 1963-NMSC-095, ¶9, 75 N.M. 70 (“All legislation is to be construed in connection with the general body of law.”).

As provided by *Hubble*, the statutory construction analysis begins by examining the words chosen by the Legislature. In this case, the relevant word chosen by the legislature was “refund.” Black’s Law Dictionary, 1394 (9<sup>th</sup> ed. 2009), defines “refund” as “[t]he return of money to a person who overpaid[.]” This definition is consistent with the manner in which the Department has interpreted the term “refund” for the purposes of Section 7-9-67. Examples provided in Regulation 3.2.227.8 – 3.2.227.12 NMAC include circumstances in which a buyer who purchases goods from a seller then returns those goods for a reimbursement of the purchase price.

Applying *Johnson*, and finding that the statute is plain on its face, the Hearing Officer is then prohibited from reading extra words into the statute, including the word “restitution.” In fact, the Hearing Officer determined that reading “refund” to include “restitution” would lead to an absurd result not in accord with legislative intent and purpose which the rules of statutory construction seek to avoid. The Legislature did not include the term “restitution” when it fashioned the deduction for refunds, despite the fact that “restitution” is a term that is well-

known to the Legislature because it has defined and utilized the term in numerous other legislative acts such as NMSA 1978, Section 31-17-1 (addressing victim restitution by criminal offenders under the Criminal Code).

To the extent any doubt remains regarding the Legislative intent underlying NMSA 1978, Section 7-9-67, the same rule applied in reference to the application of Section 7-9-73.2 applies when considering the application of a deduction for refunds. Where an exemption or deduction from tax is claimed, the statute must be construed strictly in favor of the taxing authority, the right to the exemption or deduction must be clearly and unambiguously expressed in the statute, and the right must be clearly established by the taxpayer. *See Wing Pawn Shop*. Applying these rules, the Hearing Officer was not persuaded that the Taxpayer was entitled to a deduction under Section 7-9-67 for restitution.

As previously stated, the Taxpayer never expressly asserted a claim to a deduction under NMSA 1978, Section 7-9-67, but the Hearing Officer nevertheless considered his arguments under the only potentially applicable deduction. The Taxpayer did not establish a right to a deduction under these circumstances.

### **Taxpayer's Policy Arguments.**

Taxpayer commented that the Department, by failing to refund gross receipts taxes deriving from the sale of counterfeit prescription drugs was incurring a financial benefit from an illegal activity. Despite Taxpayer's policy arguments, it is also unlikely that the Legislature intended that one convicted of a crime receive a tax benefit in the form of a deduction for court ordered restitution intended to compensate third parties for a criminal acts. Had this been the intention of the Legislature, then it would have expressly included "restitution" when it crafted the deduction for refunds under Section 7-9-67. Otherwise, NMSA 1978, Sec. 7-9-5 states that

“[t]o prevent evasion of the gross receipts tax and to aid in its administration, it is presumed that *all* receipts of a person engaging in business are subject to the gross receipts tax.” (emphasis added).

### **Motion to Supplement or Amend Protest**

Taxpayer indicated that his application for refund erroneously omitted January of 2012 despite his intention to seek a refund for all reporting periods in 2012. The Hearing Officer treated the request as an oral motion to supplement or amend Taxpayer’s protest. The Department opposed the motion and argued that the period to supplement or amend Taxpayer’s protest lapsed pursuant to Regulation 3.1.7.11 (A) which provides that a taxpayer may supplement a protest no later than 10 days prior to a hearing or as otherwise provided in a scheduling order. The Department also argued that the statute of limitations precluded an amendment or supplement to include January of 2012. The Hearing Officer reserved ruling on the motion and permitted the Taxpayer to present evidence relevant to January of 2012.

The Hearing Officer declines to make a finding on the question of whether Taxpayer can orally amend or supplement his protest at the hearing because the issue is moot in light of the substantive analysis above. That is, even if the Hearing Officer were to find that Taxpayer was entitled to amend his protest at such a late stage in the proceeding, and that the period ending January of 2012 was not precluded by the statute of limitations, the Taxpayer still failed to establish an entitlement to the deduction underlying his Application for Refund.

For the stated reasons, the Taxpayer’s protest should be denied.

### **CONCLUSIONS OF LAW**

A. Taxpayer filed a timely, written protest to the Department’s denial of the claim for refund, and jurisdiction lies over the parties and the subject matter of this protest.

B. A hearing was timely set and held within 90-days of the Department's acknowledgment of receipt of a valid protest under NMSA 1978, Section 7-1B-8 (2015).

C. Taxpayer did not establish by a preponderance that Taxpayer was entitled to the claimed deductions or any refund resulting from the application of NMSA 1978, Section 7-9-73.2.

D. Taxpayer did not establish by a preponderance that Taxpayer was entitled to the claimed deductions or any refund resulting from the application of NMSA 1978, Section Sec. 7-9-67.

For the foregoing reasons, the Taxpayers' protest **DENIED**.

DATED: April 14, 2017



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Chris Romero  
Hearing Officer  
Administrative Hearings Office  
Post Office Box 6400  
Santa Fe, NM 87502

## NOTICE OF RIGHT TO APPEAL

Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this decision **by filing a notice of appeal with the New Mexico Court of Appeals** within 30 days of the date shown above. If an appeal is not filed **with the Court of Appeals** within 30 days, this Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates the requirements of perfecting an appeal of an administrative decision with the Court of Appeals. Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative Hearings Office may begin preparing the record proper. The parties will each be provided with a copy of the record proper at the time of the filing of the record with the Court of Appeals, which occurs within 14 days of the Administrative Hearings Office's receipt of the docketing statement from the appealing party. *See* Rule 12-209 NMRA.

